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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 COUNTY OF SAN DIEGO

17 CENTRAL DIVISION

18 IN RE: 2007 WILDFIRE INDIVIDUAL)
LITIGATION - WITCH CREEK/GUEJITO)
19 FIRES)
20)
21)
22)
23)
24)
25)
26)
27)
28)

Case Nos. CPU-PO-CTL 2008 00093080

I/C Judge: Richard E.L. Strauss
Dept.: C-75

**OPPOSITION BY MOVING
PLAINTIFFS AND PCG-1 TO
SDG&E'S MOTION FOR A CASE
MANAGEMENT ORDER**

Date: June 19, 2013

Time: 10:00 a.m.

1. Summary of Argument

While the mediation program has been successful for most cases, there remains a small pool of cases which have not settled despite plaintiffs' best efforts in mediation. The total number of these cases is not yet clear, but the number is in the tens of cases and is well beyond

1 the sixteen cases in SDG&E's proposal.

2 SDG&E's proposal will prolong, not hasten, the resolution of remaining cases.
3 SDG&E's proposal will not result in an appealable or enforceable judgment until after
4 conclusion of a liability/punitive damages trial. Sequencing four separate phases before four
5 separate juries, with intervals for motions for summary adjudication and damages discovery, will
6 delay the inevitable liability/punitive damages trial and final judgment for years to come.
7 Damage determinations for only sixteen cases will do nothing for the cases which are not among
8 the sixteen.

9 SDG&E's proposed "damages only" phases cannot, as a matter of law, resolve all of
10 plaintiffs' damages claims, because plaintiffs' claims for punitive and exemplary damages
11 must be decided by the same jury which determines malice, fraud, or oppression in a preceding
12 liability trial. (*Civ. Code* section 3295(d)) A jury in a punitive damages phase must determine a
13 reasonable relationship between an amount of punitive damages and the "harm" caused by a
14 defendant's conduct, which requires plaintiff to present evidence of harm to this same jury. If a
15 preliminary "damages only" phase is required, the evidence of harm in the punitive damages
16 phase will duplicate the evidence in the "damages only" phase, thus inconveniencing witnesses
17 who will testify twice and wasting the Court's resources.

18 SDG&E's plan violates the statute requiring precedence for inverse condemnation
19 proceedings. (*C.C.P.* section 1260.010) A court does not have discretion to set an order of trials
20 in violation of a mandatory precedence statute.

21 SDG&E does not define "damages only." In addition to punitive damages, plaintiffs seek
22 damages which SDG&E has refused to pay, such as the economic value of labor undertaken to
23 remedy fire damage, mandatory doubling of damages to trees and underwood (*Civ. Code* section
24 3346), prejudgement interest (*Civ. Code* sections 3287, 3288), and mandatory interest for
25 inverse condemnation (*C.C.P.* section 1036). Absent irrevocable agreement by SDG&E to pay all
26 damages at the end of a "damages only" phase, SDG&E's plan is even more an idle exercise.

27 Finally, SDG&E's plan is unfair and prejudicial to plaintiffs. After nearly six years, must
28 plaintiffs wait another several years before the start of the first liability trial for the 2007 fires?

1 Several plaintiffs have died waiting for their cases to resolve. Memories of witnesses are fast
2 fading, and further delay of the liability/punitive damages trial will only ensure further loss of
3 evidence. SDG&E's plan reverses the well established order of proof of liability, causation, and
4 damages. SDG&E's plan gifts SDG&E with a defense attorney's dream to have a jury determine
5 damages without hearing why and how those damages were caused.

6 SDG&E exaggerates the time it will take to prepare for a liability trial, the number of
7 witnesses involved, and the number of contested issues. Unlike most fire cases, there is no
8 dispute about how the fires were caused and where they started. There will be little or no dispute
9 about progression.

10 The best way to promote settlement of and ultimately resolve all cases is for all parties to
11 face the music of a real trial. Win or lose. Nothing focuses the attention and ability of parties to
12 compromise like the prospect of losing everything.

13 **2. Preliminary "Damages Only" Phases Will Prolong, Not Hasten, Resolution Of The** 14 **Remaining Cases**

15 SDG&E's plan will not hasten but will further prolong resolution of the remaining cases.
16 SDG&E makes no commitment to pay all damages awarded in a "damages only" phase.
17 Plaintiffs will not obtain an enforceable or appealable judgment until after a liability/damages
18 trial. SDG&E's own proposed order contemplates a liability trial: "[t]he Court will set dates and
19 cases for the four damages-only trials, and set a date for a liability trial to follow the damages
20 trials." (SDG&E Proposed CMO p.1 lines 15-17) All parties have agreed in the past that a
21 liability trial will have to happen. The question is when.

22 SDG&E's plan pushes the liability trial too far into the future. Starting in August 2013,
23 SDG&E's plan contemplates sufficient time before each of the four trials to exchange expert
24 witness information, conduct all damages discovery, including experts, and to file and have heard
25 at least 30 days before trial motions for "summary judgment." (SDG&E Brief p. 2 line 25)
26 Allowing six months for preparation, motions, and trial of each set of four cases, the four trials
27 will not conclude until two or more years in the future, in or after August 2015. This estimate is
28 optimistic. As a result, the liability trial will be delayed until late 2016 or 2017, by which time
the ten year anniversary of the 2007 fires will have arrived. Further substantial delay of a liability

1 trial, sought by plaintiffs repeatedly over the last four years, is beyond the reasonable exercise of
2 the Court's discretion.

3 SDG&E's plan will do nothing to resolve the sixteen trial cases unless SDG&E makes an
4 irrevocable commitment to pay all damages awarded as a result of those trials. Damages only
5 trials of sixteen cases will not advance settlement of the other cases, because by now all of the
6 damages issues in the remaining cases are individual. Standards for settlement were set by law
7 and in mediation long ago for valuations of losses of avocado groves, nascent businesses, and
8 annoyance and inconvenience. Any remaining damages issues between the parties are individual
9 to a particular case and depend upon the particular facts of that case. For examples, does a
10 particular plaintiff intend or have a personal reason to replace destroyed property? Are particular
11 replacement costs reasonable in light of a particular property's diminution in value? A verdict on
12 individual issues will do nothing to help settle different cases with different facts.

13 The prominence of individual issues in the remaining cases is highlighted by the disparate
14 facts of moving plaintiffs' cases: (a) death from smoke inhalation (Romero and Anderson); (b)
15 destruction of nursery, office, and database for a successful truck terminal sales business
16 (Shields); (c) destruction of large rural estate, including a home, office, barns, and many
17 ornamental oak trees (E.A. Ranches); (d) destruction of a commercial avocado grove and part of
18 a palm grove (Henry Ranch); (e) evacuation of tribal members from their homes, destruction of
19 thousands of Engelman oak trees on tribal land, and loss of a buffalo herd (Mesa Grande Band);
20 (f) aggravation of Crohn's disease resulting in complete disability (Hensley); and (g) complete
21 destruction of a Rancho Santa Fe home and its contents (Moinzadeh). (See Brief In Support of
22 Motion Re The Combined Witch/Guejito Trial p.5-7) A damages only trial of any one of these
23 cases will not materially assist settlement of any other case, whether those cases be moving
24 plaintiffs' or those waiting in the wings.

25 Contrary to its arguments in the present motion, SDG&E agrees:

26 Mr. Chiate: [Counsel] says, well, the reason we haven't settled is because there are these
27 issues and we don't recognize what the law is. There is no question what the law is. We
28 all know what the law is. That's not standing in the way of anything.

(Exhibit 9, Excerpts of Reporter's Transcript, p. 21 lines 22-26)

1 and, “Mr. Chiate: The jury, what are they going to decide? They are going to decide how much
2 to give an individual person for their peculiar situations.” (*Id.* at p. 22 lines 13-15)

3 SDG&E’s brief reports alleged barriers to settlement in mediation. Plaintiffs add a very
4 different one. In recent months, SDG&E has refused to settle several cases on terms
5 recommended by the mediator who heard, often in multiple sessions, all of the relevant facts and
6 arguments. In the absence of a liability trial date, there is no pressure on SDG&E to settle the
7 more difficult cases.

8 The time to set a liability trial is now, and SDG&E’s plan for further delay must be
9 rejected.

10 **3. As A Matter Of Law, “Damages Only” Phases Cannot Resolve Plaintiffs’ Claims For** 11 **Punitive and Exemplary Damages**

12 SDG&E’s proposed “damages only” phases cannot resolve all of plaintiffs’ damages
13 claims, because many of the remaining plaintiffs seek punitive and exemplary damages from
14 SDG&E for its egregious conduct which caused the subject fires.

15 The master complaints for the Witch/Guejito and Rice Canyon fires seek punitive and
16 exemplary damages from SDG&E for its malicious and oppressive conduct in four separate
17 causes of action.¹ Plaintiffs’ adoptions of the master complaints claim punitive and exemplary
18 damages from SDG&E, often in more specific factual terms than alleged in the master
19 complaints.² Many moving plaintiffs seek punitive damages against SDG&E under the
20 additional theory of willful violation of *Public Utilities Code* section 2106.³

21 ¹Exhibit 1, Second Amended Master Complaint For Individual Residents And Business Owners (Witch/Guejito
22 Fires) p. 16 par. 9.12; p. 19 par. 11.8; p. 20 par. 13.4; p. 23 par. 15.8; p. 30 par. 7.

23 Exhibit 2, Amended Master Complaint for Individual Residents And Business Owners (Rice Canyon Fire) p.
12 par. 8.12; p. 15 par. 10.8; p. 16 par. 12.4; p. 18 par. 14.9; p. 23 par. 7.

24 ² Exhibit 3, *Malone* Complaint, adopted by moving plaintiffs Terebessy and Shields, p.4 par. 9.17; p. 6 par.
11.9; p. 8 par. 13.10; p. 10 par. 15.13; p. 19 line 24.

25 Exhibit 4, *Cohn* Complaint, adopted by moving plaintiff E. A. Ranches, p. 10 par. 9.12.1; p. 12 par. 11.8; p.
14 par. 13.4.1; p. 16 par. 15.8.1; p. 22 par. 23.5; p. 23 line 24.

26 Exhibit 5, *Mesa Grande* Complaint, adopted by moving plaintiffs Mesa Grande Band Of Mission Indians, Lee,
27 and Murray, p. 10 par. 6.6; p. 12 par. 9.12.1; p. 14 par. 11.10; p. 17 par. 13.4; p. 20 par. 15.8.1; p. 29 par. 23.6; p. 31
line 13.

28 Exhibit 6, *Anderson Romero* Complaint.

³Exhibit 3, *Malone* Complaint, adopted by moving plaintiffs Terreberry and Shields, p. 14 par. 17.18.
Exhibit 4, *Cohn* Complaint, adopted by moving plaintiff E. A. Ranches, p. 20 par. 17.14.

1 The same jury must determine the conduct giving rise to liability in order to determine
2 malice, fraud, or oppression and the amount of punitive damages. (*Civil Code* section 3295(d);
3 *Medo v. Superior Court (Raymark Industries, Inc.)* (1988) 205 Cal. App. 3d 64, 68.) A court
4 does not have the discretion to strip a plaintiff of a punitive damages claim by means of ordering
5 a preliminary “damages only” trial phase.

6 A jury determining punitive damages must consider the reasonableness of the relationship
7 between the amount of punitive damages and the harm suffered by plaintiff. (*Kelly v. Haag*
8 (2006) 145 Cal. App. 4th 910, 914.) Punitive damages cannot be based on speculation. (*Adams v.*
9 *Murakami* (1991) 54 Cal. 3d 105, 114.) Punitive damages do not depend upon a rigid adherence
10 to a mathematical ratio of punitive to compensatory damages but instead involve “a fluid process
11 of adding or subtracting depending on the nature of the acts and the effect on the parties and the
12 worth of the defendants.” (*Gagnon v. Continental Casualty Company* (1989) 211 Cal. App. 3d
13 1598.)

14 In the final analysis, therefore, the propriety and amount of punitive damages depends
15 entirely upon the particular facts of a case. Thus, to meaningfully apply the “reasonable
16 relation” rule, the trier of fact (and reviewing court) should not focus on some bottom-
line amount of an award of compensatory damages but on the nature and degree of the
actual harm suffered by the plaintiff (and perhaps others).

17 (*Id.* at 1604.)

18 An extreme example of this principle is found in *Rufo v. Simpson* (2001) 86 Cal. App. 4th
19 573, 624, where the court focused on the nature of the harm (death by murder) to affirm a
20 punitive damages award far in excess of the customary ratio of punitive to compensatory
21 damages.

22 The “reasonable relationship” requirement compels plaintiffs to present substantial
23 damages evidence in a punitive damages phase, duplicating evidence presented in a preliminary
24 “damages only” phase. This arrangement will only inconvenience witnesses and waste judicial
25 resources.

26 SDG&E’s “damages only” proposal cannot resolve all of plaintiffs’ damages claims,

27
28 Fn. 3 continued. Exhibit 5, *Mesa Grande* Complaint, adopted by moving plaintiffs Mesa Grande Band Of
Mission Indians, Lee, and Murray, p. 20 par. 17.14.

1 because the same jury must determine liability and the amount of punitive damages. The same
2 jury determining punitive damages must hear substantial damages evidence in order to determine
3 a reasonable relationship between the amount of punitive damages and the harm to plaintiff.

4 Preliminary “damages only” trials will inconvenience witnesses and waste court
5 resources.

6 **4. SDG&E’s Plan Violates Statutory Precedence For Inverse Condemnation Proceedings**

7 The first cause of action in plaintiffs’ master and adoptive complaints is for inverse
8 condemnation against SDG&E.⁴ The compensation for a taking by eminent domain and inverse
9 condemnation is set forth in a chapter entitled “Procedures For Determining Right to Take And
10 Compensation,” *C.C.P.* section 1260.010 *et seq.* Section 1260.010 states: “[p]roceedings under
11 this title take precedence over all other civil actions in the matter of setting the same for hearing
12 or trial in order that such proceedings shall be quickly heard and determined.”

13 The statute uses the word “proceedings,” which embraces determinations of liability,
14 cause, and damages. Giving precedence to proceedings to determine tort damages violates the
15 terms of the statute. The statute is mandatory. A court does not have discretion to disobey a
16 mandatory precedence statute by setting a different order of trials even if the court believes doing
17 so to be more economical and efficient. (*Koch-Ash v. Superior Court (State Department of*
18 *Transportation)* (1986) 180 Cal. App. 3d 689, 698.)

19 SDG&E’s proposal cannot be ordered because it violates the statutory precedence given
20 to inverse condemnation proceedings.

21 **5. SDG&E’s Proposal Is Fatally Vague**

22 SDG&E does not define what is encompassed by “damages only” trials. SDG&E does not
23 irrevocably agree to pay all damages awarded after a “damages only” trial. If SDG&E does not
24 do so, “damages only” trials will be a total waste of time in every case.

25 The Court was previously informed SDG&E refuses to pay categories of damages
26 recoverable under the law in mediation. Included are damages for the economic value of a

27 _____

28 ⁴ *E.g.* Exhibit 1, Second Amended Master Complaint For Individual Residents And Business Owners (Witch and Guejito Fires), p. 11-12.

1 plaintiff's labor worked in fire recovery. SDG&E refuses to pay double damages for harm by
2 trespass to trees and underwood, which are mandatory by law. (*Civil Code* section 3346; *Kelly v.*
3 *CBI Constructors, Inc.*, (2009) 179 Cal. App. 4th 442, 463.) SDG&E refuses to pay prejudgment
4 interest in any form, although a jury may award it under *C.C.P.* sections 3287 and 3288, and
5 prejudgment interest is mandatory in inverse condemnation cases, *C.C.P.* section 1036.

6 Plaintiffs' complaints seek these damages, recovery of which must be included in any
7 final judgment.⁵ These damages can be substantial. The doubling of damages for destruction of
8 seventy-one oak trees in *Kelly v. CBI Constructors, Inc.*, *supra*, 179 Cal. App. 4th at 459,
9 amounted to \$375,000, for total tree damages of \$750,000. Prejudgment interest at seven per
10 cent annually on damages of \$1 million amounts to \$70,000 per year, which can become a big
11 number when accrued over several years.

12 Without an iron clad, irrevocable agreement by SDG&E to pay all recoverable damages
13 awarded at the end of a "damages only" trial, SDG&E's plan is truly an idle exercise.

14 **6. SDG&E's Plan Is Unfair And Prejudicial To Plaintiffs**

15 SDG&E's plan is unfair and prejudicial to plaintiffs. The additional delay of the start of a
16 liability trial for two to three years which would be necessitated by SDG&E's plan will be
17 unconscionable. Almost six years have passed since the October 2007 fires, and it defies belief
18 that a liability trial would not start until close to a decade after the fires were extinguished.

19 Plaintiffs have died waiting for their cases to settle. Among them are Gil Henry, a
20 principal of Henry Avocado, which is one of the plaintiffs moving for a liability trial. (Exhibit 7,
21 L.A. Times Obituary of Mr. Henry) Two other plaintiffs who died waiting for their cases to
22 resolve are Newell A. Mostad and Bernice Scanlan, whose cases SDG&E now moves to dismiss
23 for their failure to serve a mediation demand. (Exhibit 1 to SDG&E's Proposed CMO) Both
24 have a very good reason for not doing so.

25 Witness memories are fast fading, and counsel taking liability depositions are
26 increasingly met with the refrain of lack of memory, "it was so long ago." More postponement
27

28 ⁵ *E.g.* Exhibit 1, Second Amended Master Complaint For Individual Residents And Business Owners (Witch and Guejito Fires), p. 19 par. 11.7; p. 29 line 16; p. 30 line 7; and the adoption complaints in Exhibits 3 through 6.

1 of the liability trial will result in more lost evidence.

2 SDG&E's plan reverses the tried and true order of proof - liability, causation, and
3 damages. The plan gifts SDG&E with a defense attorney's dream of trying damages without
4 evidence of how or why those damages were caused.

5 What really drives SDG&E's proposal for more delay is its scheme to pass its fire related
6 costs to the San Diego rate payers. SDG&E can pass its fire costs to the rate payers only after a
7 reasonableness review by the Public Utilities Commission. (Exhibit 8, P.U.C. Decision Denying
8 Application, p. 19) A jury verdict and final judgment of liability and damages following a trial on
9 all issues will have a significant impact on the PUC's decision whether it is reasonable to pass
10 SDG&E's fire costs to the public. SDG&E seeks an order of the Court to further delay
11 realization of plaintiffs' inviolate right to a jury trial in favor of SDG&E's attempt to pass the
12 costs of its malfeasance to the San Diego ratepayers.

13 SDG&E's proposal is unfair and prejudicial to plaintiffs and must be denied for that
14 reason alone.

15 **7. The Setting Of A Firm Date For Trial Of Liability And Damages Is The Fastest And**
16 **Most Efficient Way to Bring Closure To The Fire Litigation**

17 SDG&E's plan delays by two or more additional years the start of a liability trial, the
18 prospect or occurrence of which is necessary to resolve the remaining cases. Why does SDG&E
19 want more delay?

20 Mr. Chiate: Do we need it? We have seen verdicts. We are not silly. We know there
21 was a previous fire in San Diego. We know what the jury did in that case. We have seen
22 cases elsewhere. It's not a surprise. If these plaintiffs prove liability and they get a jury
23 verdict, it's going to be big. We know that.

24 (Exhibit 9, Excerpts of Reporter's Transcript, August 16, 2011, p. 22 lines 15-20)

25 SDG&E exaggerates the length of a Witch/Guejito liability trial. SDG&E confuses
26 plaintiffs' discovery lists under CMO No. 4 with a list of trial witnesses. In February 2010 the
27 Court entered CMO No. 4, which required the parties to "exchange lists setting forth all of the
28 percipient witnesses they presently desire to depose prior to a trial in each of the three fires."
(Exhibit 10, Case Management Order No. 4, p. 1 lines 18-20) In May 2010, plaintiffs' discovery
coordinators submitted lists of witnesses to be deposed. (Exhibit 11, Excerpt of Plaintiffs'

1 Amended Lists of Percipient Witnesses and Categories Of Experts Pursuant to Case Management
2 Order No. 4; Exhibit 12, Excerpts of Witch/Guejito Design [etc.] Discovery Group Compliance
3 With Case management Order No. 4)

4 The list of witnesses who plaintiffs desired to depose three years ago is far different from
5 the list of witnesses who plaintiffs intend to call at trial. Much work has been done in the
6 intervening three years. Plaintiffs will call far fewer witnesses at trial. Many of the witnesses who
7 plaintiffs will call at trial are officers and employees of SDG&E, who will be examined by both
8 sides on all issues, thus reducing trial time even more.

9 SDG&E points to a comment in August 2011 by one of plaintiffs' counsel estimating a
10 trial process of eight months. (SDG&E Brief p. 7 lines 11-13) But that estimate was made for a
11 very different trial plan, with (1) an inverse condemnation phase tried to the Court, (2) followed
12 by a 30 to 45 day break for the Court to make findings, (3) followed by a four to five month jury
13 trial for 30 properties on all tort and damages issues. (Exhibit 9, Excerpts of Reporter's
14 Transcript, August 16, 2011, p. 6 line 25 - 7 line 6, p. 14 lines 6-8, p. 15 lines 5-15, p. 15 lines
15 26-28, p. 16 lines 5-7; Exhibit 13, [Plaintiffs' Proposed] Case Management Order Re Combined
16 Witch/Guejito Trial) What plaintiffs seek now is much more streamlined: an all issues trial for a
17 much smaller number of named plaintiffs with consolidation and joinder of common liability
18 issues for the rest.

19 The only way the Court can get a realistic estimate of time for a liability trial is to order
20 the parties to meet and confer about specifics, e.g. what witnesses each side intends to call at trial
21 and what factual stipulations can be reached. Irrefutable facts are recognized by both sides in this
22 case which are often contested in other fire cases, such as the cause and origin of the fires
23 (SDG&E power lines) and the locations of their ignition.

24 Trial will be further shortened if the Court were to permit narrowing of the issues by
25 requiring both sides to respond to contention interrogatories, which up to now has not been the
26 case.


27 The most efficient and fastest way to resolve the remaining cases is to put both sides' feet
28 to the fire by setting a firm date for a liability trial as sought by plaintiffs in their motion.

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8. Conclusion

In the past, the Court has regularly expressed his concern that trial preparation not interfere with mediation. We are fast coming to the end of the mediation program. By following the tried and true path to case resolution - trial of liability, causation, and damages - can this case be brought most efficiently and justly to an end. SDG&E's wasteful plan must be rejected.

Dated: June 5, 2013


Thomas Tosdal
Attorneys for Plaintiffs